

STATE OF MAINE

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. AND-19-941**

IN RE: ADOPTION BY JESSICA M. et. al.

BRIEF OF APPELLANT

[REDACTED] (MOM)

**ON APPEAL FROM THE ANDROSCOGGIN COUNTY PROBATE
COURT**

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TABLE OF CONTENTS

TABLE Of AUTHORITIES	3
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	4
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	11
SUMMARY OF THE ARGUMENT.....	12
ARGUMENT.....	13
CERTIFICATE OF SERVICE.....	23

TABLE OF AUTHORITIES

US SUPREME COURT CASES

<i>Lassiter v. Department of Social Svcs.</i> , 452 U.S. 18 (1981).....	19
<i>Santosky v. Kramer</i> , 455 U.S. 745, 758 (1982).....	19
<i>Stanley v. Illinois</i> , 405 U. S. 645, 651 (1972).....	19

CASES

<i>Guardianship of Sebastian Chamberlain et. al.</i> 118 A.3d. 229 (Me. 2015).....	13
<i>Adoption of Tobias D.</i> , 2012 ME 45, ¶ 22, 40 A.3d 990 (ME 2012)	14
<i>Adoption of Isabelle T.</i> , 2017 ME 220, ¶ 14, 175 A.3d 639 (ME 2017).....	14
<i>In re Cameron B</i> , 2017 ME 18, ¶ 11, 154 A.3d. 1199 (ME 2017).....	16
<i>In re M.B.</i> , 2013 ME 46, ¶ 37, 65 A.3d 1260 (ME 2013).....	16
<i>In re Michaela C.</i> , 2002 ME 159, ¶ 27, 809 A.2d 1245 (ME 2002).....	16
<i>In re Children of Nicole M</i> 2018 ME 75, ¶15, 187 A. 3d.1(ME 2018)...19,20, 21, 22	
<i>In re David W.</i> , 2010 ME 119, ¶ 6, 8 A.3d 673 (ME 2010).....	19
<i>In re Thomas H.</i> , 2005 ME 123, ¶ 28, 889 A.2d 297 (ME 2005).....	20

STATUTORY PROVISIONS

22 M.R.S. §4002.....	13
22 M.R.S. §4055.....	12, 13, 20
18-C M.R.S. §5-210.....	22

STATEMENT OF FACTS AND PROCEDURAL HISTORY

father (hereinafter “Dad” or “**father**”) and **mother** (hereinafter “Mom” or “**mother**”) are the parents of **child** date of birth

. Both **mother** and **father** were incarcerated at the time of his birth, so **child** initially was placed into the care of the State of Maine Department of Health and Human Services who had opened a child protective matter after he was born (A. 6-9). Eventually, **Child** went to live with **mother**’s mother **Grandmother**

for the first couple years of his life. (A.6). Both parents have a history of substance abuse. (A. 6-9).

mother struggled for most of her life with substance abuse issues. (A. 6). She has had two other children that were previously adopted by her Mother. (1Tr. 151). **mother** maintained sporadic contact with her mother over the years. (2Tr. 35). She had been trouble with the law since she was 14 and has been incarcerated off and on much of **Child**’s life. (2Tr. 37)

In late 2008/2009 after successfully completing an intense court ordered reunification plan, the Child Protective Action against **father** was dismissed, and he was granted full custody of **Child** (A. 7). Over the course of the next several years, **father** lived with **Child** and was responsible for his day to day care. (A.

7). During that time, **Child** and his father developed a significant and loving father-son relationship and were very close. (2TR. 229, 239-240, 258-259, 175).

father was responsible for taking **Child** to school and was a loving attentive father. (3Tr. 118). They frequently played together, enjoying such activities as video games and sports. (Appellant Dad's Br. 5-6).¹

Unfortunately, **father** continued to struggle with substance abuse and was arrested in 2015 on Federal drug charges.(A. 8). He was eventually indicted and convicted on January 30, 2017 in the United States District Court after a plea of guilty to Conspiracy to Distribute and Possess with Intent to Distribute 280 grams or More of Cocaine Base. (A. 8). Although there was some allegations he was involved in associating with gang members and producing cocaine, **father** denied any gang activity or allowing his apartment to be used for drugs. (A. 122, 188). He was sentenced to 60 months in prison. (A. 8). After **father**'s arrest and incarceration, **Child** lived with his **Grandmother** until May of 2017 when he moved in with Appellees. (A. 8). Although apprehensive at first, **father** agreed to allow **Child** to move in with Appellees after receiving assurances from **grandmother** as to their ability to care for **Child** as well as their intentions. (3Tr. 219, 2Tr.

¹ A more thorough recitation of facts that pertain to **father** and his relationship with child are contained in the Brief of Appellant Dad and will not be repeated here.

73). On January 18, 2018, with the blessing of **father** , the Appellees became legal guardians of **Child** (A. 8, 1Tr. 111).²

Despite assuring **father** they had no intention of permanently removing **Child** from his parents, on March 26, 2018, less than 3 months after the granting of the Guardianship, the Appellee's filed the Petition to Terminate the Parental Rights and Petition to Adopt **Child** (A. 1). Both parents sent letters to the Court objecting to the Petition. (A. 2).

The trial in this matter began on April 10, 2019 and continued on April 11, 2019. Both parents were incarcerated at the time of Trial. **father** was in Federal Prison in and **mother** was in State prison in . (1Tr. 9). At the start of the first day, due to technical difficulties with both prisons, neither party was able to appear via video as originally intended. (1Tr. 3-8). **father** was able to appear via telephone but not video, and **mother** could see and hear the Courtroom on the Court's video feed but could not be seen or heard by the Court and only able to speak via telephone. (1Tr. 3, 5). Both parties moved to continue the trial, which was denied by the Court. (1Tr. 31). The trial proceeded and continued onto a 3rd day.

²The Guardianship was granted without personal service of **mother** as service was accomplished through publication (1Tr. 148).

After a four month break to allow the parties to attempt to set up video conferencing at the Lewiston District Court (which was unsuccessful), day 3 of the trial began on August 13, 2019. Unfortunately video conference was not available for **father** and he again requested a continuance, which was denied. (3Tr. 9, 12) **mother**, who had since been released from prison and was now living in

was able to appear, at least for part of the day, via video. Prior to the start of the third day, and again at the close of evidence, **mother** expressed a new position that although she at first contested the adoption and felt that the Court should not terminate the parental rights of **father**, she would consent to the adoption of **child** only *if* the Court terminated his parental rights. (3Tr. 4,5, 234-235). To that end, she expressed her desire to sign a consent to the adoption but was not able to do so on that day. (3Tr. 5, 6). Counsel then joined in **father**'s motion to continue to have time to allow **mother** to sign a consent. (3Tr. 10). The Motion was denied by the Court and the trial proceeded. (3Tr. 12). Because of her change in position, **mother** chose to not present any testimonial evidence to supplement the previously presented six documentary exhibits entered by agreement of the parties. (**mother**'s Exhibits 1-6, 1Tr. at 37). These exhibits included correspondence that **mother** sent to **child** and Appellees as well as certificates of completion of the Beyond Violence Program and the Helping

Women Recover Substance Abuse Program that she participated in while in prison (mother's Exhibits 1-6, 1Tr. at 37, 38).

At trial, Appellee aunt testified that since being in her care, child has thrived. She testified that he has improved physically, mentally and academically. (1Tr. 162, 164, 167, 170, 177-178, 3Tr. 23, 26) Appellees testified they have everything they need to meet child's needs by way of the Guardianship. (3Tr. 62). Both parents agree that the Guardianship should stay in place for the time being. (Closing Arguments of parties, 3Tr. 151, 224).

child testified at trial that he loved his father, that he thought he was a good Dad and that his Dad loves him. (2Tr. 256). He expressed a desire to continue to see his father and that his father understood him. (2Tr. 262). He reported having happy memories of walking with his Dad to school and that they spent lots of time together. (2Tr. 240, 241, 258). They both liked sports including basketball and football and many of the same food, music and movies. (2Tr. 258, 259). His father took him to church often and he played in the church band. (2Tr. 265). He stated he wanted to continue to have contact with his father and wants his father to see him play sports. (2Tr. 262).

child testified that mother has had infrequent contact with him due to the fact that she lived out of State for most of his life and struggled with her own addiction

issues. (2Tr. 270, 271). **child** also testified that he didn't really know his Mother but that he wanted to know more about her. (2Tr. 270). He remembered video chatting with her a few times. (2Tr. 269). **child** testified that he wanted to continue to live with his Aunt and Uncle and wanted to be adopted by them. (2Tr. 259, 234). However, it was not clear if he fully understood the difference between a Guardianship and an Adoption as he described adoption as "living with someone until the age of 18" while a Guardianship is "just like people you live with." (2Tr. 261).

father testified at trial that after **child** was born, he immediately attempted to see his son, (3 Tr. 116). He testified that he went through the DHHS reunification process and completed several programs to deal with his substance abuse. (3Tr. 116). In 2009, **child** reunified with **father** and moved in with him at a substance abuse treatment center . (3Tr. 116-117). **father** spent significant time with **child** , and they enjoyed taking walks, going to summer concerts, going to the Nickelodeon theatre, playing music at church and going to firework shows. (3Tr. 118). Eventually, he and **child** moved to where they lived, and **child** attended school until **father** was arrested. (3Tr. 131).

On November 19, 2019 the Court granted the Petition to terminate the Parental Rights. (A. 6-9). In its decision the Court found that there was no evidence presented that **mother** had any meaningful contact with **child** following his birth and

that she has therefore abandoned him. (A. 6-9). With respect to father , the Court found that father was unable to meet child's needs "within a time reasonable calculated to meet his needs" and termination of both parents' parental rights is in the best Interest of child. (A.6-9). This appeal followed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE TRIAL COURT ERRED IN FINDING THE EVIDENCE WAS SUFFICIENT TO SUPPORT PARENTAL UNFITNESS AND ABANDONMENT FINDINGS
- II. WHETHER THE COURT ERRED IN FINDING THAT TERMINATION OF THE APPELLANTS' PARENTAL RIGHTS IS IN THE BEST INTEREST OF [child](#)
- III. WHETHER THE COURT ERRED IN FAILING TO CONSIDER THE PERMANENCY AND STABILITY ALREADY BEING PROVIDED BY THE GUARDIANSHIP, WHEN WEIGHED AGAINST THE CONSTITUTIONAL RIGHTS OF THE APPELLEES IN DETERMINING TERMINATION IS IN THE BEST INTERESTS OF [child](#) .

SUMMARY OF THE ARGUMENT

The Appellant/Mom first argues that the Court erred in finding that the Appellees met their burden to prove by clear and convincing evidence that they are unfit parents justifying Termination of Parental Rights under 22 M.R.S. §4055. Mom next contends that even if the Appellees met their burden of parental unfitness, the Court erred in determining that termination of parental rights is in the best interests of [child](#) with respect to both parents in general but Appellant/Dad in particular and joins and adopts Dad's argument on these points.

Mom's final argument is that the Court erred by failing to consider the permanency and stability already being provided by the Guardianship, when weighed against the Constitutional rights of the Appellants in determining termination is in the best interests of [child](#). [mother](#) argues that the Court committed reversible error and abused its discretion in finding that permanency for [child](#) can only be accomplished by Termination despite the fact that his permanency requirements are being met by the current Guardianship, especially when weighed against the constitutional rights of the Appellants.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN FINDING THE EVIDENCE WAS SUFFICIENT TO SUPPORT PARENTAL UNFITNESS AND ABANDONMENT FINDINGS

A. Legal Standard

In order to terminate the parental rights of the parents under 22 M.R.S. §4055, the Court must find, by clear and convincing evidence, that Termination is in the best interests of *child* and the parents are either unwilling or unable to protect *child* from jeopardy, and that these circumstances are unlikely to change within a time which is reasonably calculated to meet *child*'s needs, and/or the *child* has been abandoned. "Facts are established by clear and convincing evidence when the proof offered 'create[s] in the fact-finder an abiding conviction that it is highly probable that facts sought to be proved are the correct view of the events.'" *Guardianship of Sebastian Chamberlain et. al.* 118 A.3d. 229 (Me. 2015) (internal citations omitted). Title 22 M.R.S. §§ 4002(1-A) defines Abandonment" as any conduct on the part of the parent showing an intent to forego parental duties or relinquish parental claims.

Before the Court can determine whether termination is in the best interest of the child, the Court first has to determine by clear and convincing evidence whether or not the Appellants are unfit parents:

“Before the Court can even consider what is in the child’s best interest, the Court has to determine if Mom is fit. Unfitness has been defined as unwilling or unable to take responsibility for L.E. within a time reasonably calculated to meet her needs. We have stated: ‘A parent’s fitness is usually called into question due to a serious issue that bears directly on his or her ability to adequately parent the child, such as physical abuse or neglect, sexual abuse, substance abuse, emotional abuse and significant mental health problems, a proven inability to care for a child with special needs, or a history of domestic violence.’ *Adoption of Tobias D.*, 2012 ME 45, ¶ 22, 40 A.3d 990 (ME 2012) (citations omitted).

If the Court cannot find by clear and convincing evidence that both parents are unfit, then the Petition to Terminate had to be denied. The Petitioners have the burden of proving unfitness. As [father](#) correctly argues in his Brief, this is a private adoption case in which neither parent has been accorded opportunities for rehabilitation or reunification, a particularly “rigorous application of quality of evidence standards” must inform this Court’s review. *Adoption of Isabelle T.*, 2017 ME 220, ¶ 14, 175 A.3d 639 (ME 2017) . Had DHHS been involved, both parent’s contact and reunification with [child](#) would have been characterized by court-mandated facilitation, rather than the arbitrary stoppage of all communication by Appellees.

B. The Court erred by finding that the Appellant met their burden by Clear and Convincing Evidence that the parents are unable or unwilling to meet child's needs within a reasonable time

In making its findings, the Court found that mother had abandoned child, finding that she presented no evidence of meaningful contact with child or that she ever returned to Maine for a visit and as such she never had a relationship with the child. (A. 6-7). However, although mother did not present any testimonial evidence, there was evidence presented that she had written letters and cards to child and had spoken to him on the phone and via video chat. (mother's Exhibits 1-4, 1Tr. 193, 2Tr. 269, 274). Furthermore, child testified that he remembers having contact with his mother. (2Tr. 269). Appellees also conceded that they have not allowed mother to communicate with child and did not give any correspondence that she sent to him. (1Tr. 192, 194). It is clear that they took advantage of mother's incarcerated state to completely sever any chance of her having a relationship or even basic communication with mother. There was no evidence presented that mother ever intended to relinquish her parental rights. In fact there was evidence presented in the form of letters sent to child before the Guardianship showing the opposite. (Petitioner's Exhibit 3). The Court's finding of abandonment was therefore clear error.

However, even if there was sufficient evidence to meet the clear and convincing evidence standard showing unfitness and/or abandonment as to mother,

there was no such evidence as it pertains to father . mother joins and adopts the arguments presented in father 's Appellant Brief with respect to findings of his unfitness.

II. WHETHER THE COURT ERRED IN FINDING THAT TERMINATION OF THE RESPONDENTS' PARENTAL RIGHTS IS IN THE BEST INTEREST OF child

A. Legal Standard

With regard to the best interest determination, The Court reviews the trial court's “. . . ultimate conclusion for an abuse of discretion, viewing the facts, and the weight to be given them, through the trial court's lens." *In re Cameron B*, 2017 ME 18, ¶ 11, 154 A.3d 1199 (ME 2017) *quoting In re M.B.*, 2013 ME 46, ¶ 37, 65 A.3d 1260 (ME 2013) (quotation marks omitted). "The District Court's judgment on the issue of best interest is entitled to substantial deference because that court is able to directly evaluate the testimony of the witnesses." *In re Michaela C.*, 2002 ME 159, ¶ 27, 809 A.2d 1245 (ME 2002).

Even if the Court finds that the evidence is sufficient to support the Court's finding that Appellees have met their burden as to fitness, the Court erred and abused its discretion in finding that it is in the best interest of child to terminate the Appellant's parental rights.

B. Given the significant relationship between father and child and child's desire to continue contact with both parents, the Court erred in finding Termination is in child's best interest.

At trial the Appellee's agreed that father was an important part of child's life and testified that they intended to continue to allow contact between father and child if the Petition for Termination of Parental Rights were granted. (1Tr. 224, 226, 3Tr. 30, 33). They further stated that they would allow contact between child and mother if that is what child wanted. (3Tr. 33). However, in making its decision, the Court cannot assume that this will, in fact, happen when determining whether Termination is in child's best interest. Even if it could, the Appellee's actions shed doubt as to whether they actually will allow meaningful contact.

The Appellees testified that they always encouraged father to contact child, and vice-versa. However, they admitted on cross examination that they arbitrarily cancelled text message and email services and limited father to communications via written letters, which severely curtailed his ability to contact his son. (1Tr. 188, 202, 205-260). The only reasons cited were that the electronic services were inconvenient, expensive and "anxiety provoking." (1Tr. 205-206). However, even when they did receive communications, they did not pass on some to child because they felt they were inappropriate. (1Tr. 203). They also did the same to mother and admitted that any letters and cards she sent were not given to

child. (1Tr. 192-194). The Court therefore ignored the fact that Appellees have simultaneously limited the ability of child's parents to contact child while at the same time attempting to use lack of consistent contact as grounds for Termination of Parental Rights.

Furthermore, once parental rights are terminated, the Petitioners are no longer under any legal obligation to let child ever see or communicate with his parents again. Any assurances or promises made at trial (even if made in good faith) could not be legally enforced post-adoption. Therefore, the Court *must* assume in making its decision that child will never speak to or see either parent again and determine whether this is in his best interests by clear and convincing evidence. The Court must take into consideration the fact that prior to his incarceration, father had a long and loving relationship with his son, was his primary caregiver for several years, that child has expressed a love for his father and desire to maintain a relationship with him, and decide whether the Petitioners have proven that is in child's best interest to completely sever this relationship and that child may never see or speak to his father or to mother ever again. mother submits that the Appellee's failed to meet this burden and the Court committed clear error and abused its discretion in granting the petition.

III. WHETHER THE COURT ERRED IN FAILING TO CONSIDER THE PERMANENCY AND STABILITY ALREADY BEING PROVIDED BY THE GUARDIANSHIP, WHEN WEIGHED AGAINST THE CONSTITUTIONAL RIGHTS OF THE APPELLANTS IN DETERMINING TERMINATION IS IN THE BEST INTERESTS OF [child](#) .

The Appellees have a fundamental constitutional right to parent their children. [mother](#) has a “commanding right” in protecting her interest and right to parent, which is “an interest far more previous than any property right”. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). The Supreme Court has stated “This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’ ” *Lassiter v. Department of Social Svcs.*, 452 U.S. 18 (1981) *quoting Stanley v. Illinois*, 405 U. S. 645, 651 (1972)

A central tenet of the child protection statutes "is the importance of permanency for children subject to child protection proceedings." *In re Children of Nicole M* 2018 ME 75, ¶ 15, 187 A. 3d.1(ME 2018) *quoting In re David W.*, 2010 ME 119, ¶ 6, 8 A.3d 673 (ME 2010) (quotation marks omitted). “Permanency planning is integrally connected to the best interest determination that a court is called upon to make in a termination proceeding. As we have held, “[p]ermanency

planning and the best interest determination made in a termination proceeding cannot be divorced from one another because a best interest decision necessarily requires the court to consider the long-term living arrangement that will best serve a child's needs. The court's permanency plan for the child is an inextricable part of that decision." *Id.* quoting *In re Thomas H.*, 2005 ME 123, ¶ 28, 889 A.2d 297 (ME 2005).

Although this is not a child protective matter, the Court must utilize the same high standards found in 22 M.R.S. §4055 in determining whether or not to Terminate parental rights. However, unlike a child protective proceeding, the child is not in foster care, but rather, is under the protection of a permanent Guardianship.

The Court, in the Order of November 19, 2019, merely found that Termination of Parental Rights is in [child](#)'s best interest due to the fact that he is thriving in the care of the Appellees. The Court stated it "may consider the length of a parent's incarceration and their ability to take responsibility for the child within a time reasonable calculated to meet child's needs, particularly in light of the strong policy in favor of permanency." (A. 9). However, the Court did not consider or state in its findings why [child](#)'s permanency needs are not currently being met by the Permanent Guardianship already in place and whether or not

continuing that Guardianship would be in [child](#)'s best interests while also considering the constitutional rights of the Appellants.

The Guardianship that is in place was granted without restriction or limitation. It was also granted without objection from either Appellant. Although [aunt](#) testified that when [child](#) came to live with them it was not intended to be permanent, less than three months after being awarded the Guardianship the Petitioners filed their Motion to Terminate Parental Rights and Adopt. (A.1, 1Tr. 149). [father](#) testified that he felt betrayed by this and felt it was their plan all along when filing the Guardianship to adopt [child](#). (3Tr. 145, 146). Regardless of their true intent, the Guardianship is sufficient to meet [child](#) needs and is the only way to insure that [child](#) desire to continue a relationship with his father is met and leaves the door open for him to establish a relationship with his Mother, if that is his choice.

In *In re Children of Nicole M*, *supra*, the Court considered this issue in the context of the Court terminating parental rights and then setting forth a post-termination permanency plan of adoption or guardianship. The Court held the parents' argument that the availability of a permanent guardianship establishes that termination was not necessary does not take into consideration the potential "impermanence" of a permanent guardianship. *Id* at 26. However, this case can be factually distinguished here because the Guardianship is already in place and [child](#)

is in a safe stable placement as compared to the children in that case who were merely informally placed with their Grandmother. The Court in *Nicole M* noted there was a level of uncertainty of the child's placement because their Grandmother, who had been caring for them, had been denied an application to become a licensed foster parent. *Id* at 25. The Court therefore suggested a post termination plan to insure that the children stayed with the grandmother either through Guardianship or adoption. *Id*.

In the present case *child* has been with the Appellants since 2017. Neither Appellant has filed a Motion to Terminate the Guardianship and neither has argued that the Guardianship should be terminated or that *child* should be removed from his current home. In fact, *father* testified that he feels *child*'s needs are being met and that he would need some time upon his release to get on his feet and that he had no intention of removing *child* from the Petitioners' home. (3Tr. 151). Even if he did, *father* would still have to meet the statutory requirements of 18-C M.R.S. §5-210 and prove that he was a fit parent and would be in *child*'s best interest to terminate the Guardianship. Therefore there is no permanency or safety issue and the Guardianship is sufficient to balance the need of stability and permanence for *child* while also maintaining his relationship with his father and potentially, his mother. The Court therefore erred by not weighing the Constitutional Rights of the parents to remain involved in *child*s life with permanency already being provided by

the Guardianship before determining that termination as in the best interests of the child.

CONCLUSION

For the reasons set forth above, the Appellant Mom respectfully requests that this Honorable Court reverse the judgment of the trial court.

Date: February 17, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief of the Appellant upon the Appellee's Attorney by hand delivery and to Appellant's (Dad's) Attorney by mailing to their address on files. I emailed a PDF to each party via the emails provided to me by them and to the Clerk of Court's at lawcourt.clerk@courts.maine.gov

Date: February 17, 2020

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